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STATE CAPITOL  
PHOENIX, ARIZONA

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DEPARTMENT OF LAW OPINION NO. 72-10 (R-32)

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REQUESTED BY: THE HONORABLE ROBERT KENNEDY  
Chairman  
Arizona State Tax Commission

QUESTION: Does A.R.S. § 41-1279.04 authorize the Auditor General to audit the books and records of the Arizona State Tax Commission?

ANSWER: See body of opinion.

The applicable statutory provisions are as follows:

"§ 41-1279.04. Authority to examine records; violation

"The auditor general shall have access to, and authority to examine, any and all books, accounts, reports, vouchers, correspondence files and other records, bank accounts, money and other property of any state agency, whether created by the constitution or otherwise. It shall be the duty of any officer or employee of any such agency, having such records under his control, to permit access to, and examination thereof, upon the request of the auditor general or his authorized representative. Any officer or person who fails or refuses to permit such access and examination is guilty of a misdemeanor."

"§ 43-145. Publicity of returns

"(a) Returns to be kept for at least four years. The tax commission shall preserve reports and returns for four years and thereafter until it orders them to be destroyed.

"(b) Disclosure of information in returns

"(1) Judicial order, return information disclosed pursuant to. Such information

may be disclosed in accordance with proper judicial order in cases or actions instituted for the enforcement of this title or for the prosecution of violations of this title.

"(2) Department of law may have information--county attorneys may have information when authorized by attorney general. The attorney general or any county attorney authorized in writing by the attorney general shall have the right to inspect the reports or returns of any taxpayer filing a report or return under this title, when required for the purpose of instituting action for the enforcement of this title or any other law relating to taxes or for the prosecution of violations of this title or any other law relating to taxes.

"(3) Reciprocal exchange of information. The tax commission may permit the commissioner of internal revenue of the United States, or other tax officials of this state, or the proper officer of any state imposing an income tax or a tax measured by income, or the authorized representative of any such officer, to inspect the income tax returns of any individual, estate, trust or partnership, or may furnish to the officer or his authorized representative an abstract of the return of income of any taxpayer or supply him with information concerning any item of income contained in any return or disclosed by the report of any investigation of the income or return of income of any taxpayer. Permission shall be granted or information furnished to the officer or his representative only if the statutes of the United States or of the other state, as the case may be, grant substantially similar privileges to the tax commission of this state.

"(c) Penalty for disclosing information contained in the return

"(1) In general. Except as otherwise provided in this section, it is a misdemeanor for the tax commission, any deputy, agent, clerk, or other officer or employee, to disclose in any manner information as to the amount of income or any particulars set forth or disclosed in any report or return required under this title. Any violation of this paragraph shall, upon conviction thereof, be punishable by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or both, at the discretion of the court.

"(2) Information, penalty for unlawful use. The information furnished or secured pursuant to subsection (b) (2) or (3) shall be used solely for the purpose of administering the tax acts or laws administered by the person or agency obtaining it. Any unwarranted disclosure or use of the information by the person or agency, or the employees and officers thereof, is a misdemeanor. Any violation of this paragraph shall, upon conviction thereof, be punishable by a fine not to exceed one thousand dollars or by imprisonment not to exceed one year, or both, at the discretion of the court.

"(d) Disclosure of information, reimbursement for costs thereof. Whenever under this title or any law heretofore or hereafter enacted, the tax commission is required or permitted to disclose information, to furnish abstracts, or to permit access to its records, to or by any official, department, bureau, or agency of this state (including its political subdivision), or any other state, or the United States, it may charge the official, department, bureau, or agency for the reasonable cost of its services.

"(e) Statistics. Subsection (a) does not prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and

the items thereof, or the publication of the percentage of dividends paid by any taxpayer which is deductible by the recipients thereof under the provisions of this title."

"§ 42-1307. Confidential nature of reports

"Unless required by judicial order or as provided by this article, the members of the commission, its agents, clerks or stenographers shall not divulge the gross income, gross proceeds of sales or the amount of tax paid by any person as shown by the reports filed as required by this article, except to members and employees of the commission for the purpose of checking, comparing and correcting returns, or to the governor, the attorney general or other authorized representative of the state, in any action pertaining to the tax due under this article."

Internal Revenue Code of 1954, § 7213 (26 U.S.C. § 7213):

"§ 7213. Unauthorized disclosure of information

"(a) Income returns.--

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"(2) State employees.--Any officer, employee, or agent of any State or political subdivision, who divulges (except as authorized in section 6103(b), or when called upon to testify in any judicial or administrative proceeding to which the State or political subdivision, or such State or local official, body, or commission, as such, is a party), or who makes known to any person in any manner whatever not provided by law, any information acquired by him through an inspection permitted him or another under section 6103(b), or who permits any income return or copy thereof or any book containing any abstract or particulars thereof, or any other information,

acquired by him through an inspection permitted him or another under section 6103(b), to be seen or examined by any person except as provided by law, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

At first glance it appears that the recently enacted provisions of A.R.S. § 41-1279.04 may be in conflict with A.R.S. §§ 42-1307 and 43-145. A.R.S. § 41-1279.04 contains a broad grant of authority to inspect records of state agencies while A.R.S. § 43-145 prohibits disclosure of information contained in reports and returns, and A.R.S. § 42-1307 prohibits disclosure of the gross income, gross proceeds of sales or amount of tax paid by any person as shown by the reports filed under the article imposing the transaction privilege tax. Both of these confidentiality statutes make an exception for disclosures for the purpose of actions to collect taxes due. The income tax confidentiality statute also excepts reciprocal exchanges of information with other states and the United States.

Since the Legislature set out the exceptions to the confidentiality requirements in the same statutes imposing those requirements, A.R.S. §§ 42-1307 and 43-145, the plain implication is that those provisions covered the subject completely, and no other exceptions were intended. This rule of statutory construction, which is frequently referred to as "expressio unius est exclusio alterius", has been followed by the courts in this state. In Elfbrandt v. Russell, 97 Ariz. 140, 397 P.2d 944 (1965), reversed on other grounds, 86 S.Ct. 1238, 384 U.S. 11, 16 L.Ed.2d 321, the Court said:

"A statute which enumerates the subjects or things upon which it is to operate will be construed as excluding from its effect all those not specially mentioned. . . ."

Other recent Arizona cases following this rule are Phoenix Title & Trust Co. v. Burns, 96 Ariz. 332, 395 P.2d 532 (1964), and Lewis v. Industrial Commission, 93 Ariz. 324, 380 P.2d 782 (1963). The rule is stated in Sutherland on Statutory Construction, 3d ed., § 4915 as follows:

"As the maxim is applied to statutory interpretation, where a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are affirmative or negatively designated, there is an inference that all omissions were intended by the legislature."

Applying the rule of expressio unius est exclusio alterius, we conclude that the Auditor General is prohibited from inspecting those reports and returns of taxpayers which are confidential under the provisions of A.R.S. §§ 42-1307 and 43-145. This conclusion is supported by the decision of the Court in Wales v. Tax Commission, 100 Ariz. 181, 412 P.2d 472 (1966). In placing a very narrow construction on the provisions of A.R.S. § 43-145 the Court, after noting that the confidentiality policy facilitates tax enforcement by encouraging a taxpayer to make a truthful declaration in his return without fear his statements will be used against him for other purposes, said:

" . . . The failure to protect the secrecy of tax returns and reports, except where necessary to institute or prosecute a tax violation, strikes at the heart of the Fifth Amendment for it makes possible a variety of criminal prosecutions from information obtained by reason of an inspection of a tax return extorted under compulsion of law. . . ."

Another indication that the protection of the confidentiality of these reports and returns is extremely important to the Legislature is the recent expansion of this protection by Chapter 128, Section 2, Session Laws of 1971, to prohibit those preparing tax returns from disclosing any information furnished by the taxpayer. This shows the continuing interest of the Legislature in maintaining the confidentiality of tax returns.

Since A.R.S. §§ 42-1307 and 43-145 prohibit the Auditor General from examining reports and returns filed by taxpayers, there may be a conflict between those statutes and A.R.S. § 41-1279.04, depending on whether that statute applies to all records and reports which are in the custody of the

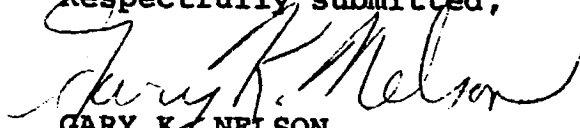
state or only applies to records and reports which are generated by the employees of the state in the performance of their official duties. In the event that the conflict can be resolved in no other way, A.R.S. § 41-1279.04 would govern because it is the most recent statute.

Implied repeals are not favored, and it is only when by no reasonable construction can two statutes be operative, that the latter act repeals the earlier act by implication. To invoke the doctrine of implied repeal, the repugnancy or inconsistency between the provisions of the two statutes must make it apparent that the Legislature intended to repeal the earlier law by the later law. State v. Carpenter, 1 Ariz. App. 522, 405 P.2d 460 (1965).

In view of the two constructions that can be placed on A.R.S. § 41-1279.04, it is not apparent that the Legislature intended to repeal the confidentiality statutes by the enactment of A.R.S. § 41-1279.04. The construction that A.R.S. § 41-1279.04 applies only to reports and records generated by state employees in the performance of their official duties gives effect to both the confidentiality statutes and A.R.S. § 41-1279.04. It is our opinion that this is the correct construction of this statute. Another problem that would arise from construing A.R.S. § 41-1279.04 to repeal the confidentiality statutes is the possibility of prosecution of state employees by the United States under the provisions of 26 U.S.C. § 7213 for violation of that statute by making information acquired from the United States available to the Auditor General.

If the Legislature had intended for the Auditor General to have the power to inspect tax returns, it would have included another exception in the confidentiality statutes specifically authorizing the Auditor General to examine tax returns. On the basis of the reasons and authorities set out in this opinion, it is our opinion that the Auditor General has the power to examine the records of the Tax Commission generated by Tax Commission employees in the performance of their official duties, but the Auditor General does not have the power to examine any records or tax returns which are confidential under the provisions of A.R.S. §§ 42-1307 and 43-145.

Respectfully submitted,

  
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The Attorney General